United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

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No. 74-2104

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LEVIN, et al.,

Petitioners-Appellees,

vs.

MISSIPPI RIVER CORPORATION, et al.,
JACOB R. COHEN and JUNE COHEN,

Objectors-Appellants.

Appeal from the United States District Court for
the Southern District of New York.
Honorable Edward Weinfeld, District Judge

REPLY BRIEF FOR OBJECTORS-APPELLANTS

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ARGUMENT

I.

ALLEGHANY CORPORATION IS INCORRECT WHEN IT STATES THAT NOTHING IN THIS APPEAL PERTAINS TO THE FEE AWARDED TO ALLEGHANY CORPORATION.

On page 12 of their Brief appellee, Alleghany Corporation, states: "Nothing in this (Cohen) appeal pertains to the fee awarded to Alleghany Corporation ..." Nothing could be further from the truth! As Alleghany states on page 11 of their Brief: "The Cohen appeal is directed solely to the fee award and is primarily an objection to any (emphasis added) part of the fees being paid by defendant-appellee MoPac." Since under the terms of Judge Weinfeld's decision MoPac is required to pay one-half of Alleghany's $850,000 claim, this appeal does pertain to Alleghany.

Alleghany's misapprehension is understandable, however. Although it expended considerable sums for fees and expenses in the voting rights case and has the same option to seek reimbursement as did the individual plaintiffs, it recognized that it had no valid claim against MoPac and declined to engage in a futile effort. This was a sound evaluation of the law, which we trust this Court will vindicate. Further, although it was the prime mover in the recapitalization efforts, its request for fees was a

comparatively modest $850,000 compared to the individual plaintiffs' claims for $6,953,000, later scaled to $2,000,000. Nevertheless, the standards for the allowance apply equally to all parties and these Objectors contend that they be applied where appropriate to Alleghany.

II.

THE AGREEMENT TO PAY FEES DOES NOT FALL UNDER ANY OF THE EXCEPTIONS OF FLEISCHMANN V. MAIER BREWING COMPANY.

Appellees Levin and LeVasseur are correct when they state that the gist of Fleischmann v. Maier Brewing Co., 386 U.S. 714, 717 (1967) is that "attorneys' fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor;" (Levin & LeVasseur Brief, p. 16).

However, Levin and LeVasseur are incorrect when they conclude that an agreement not to oppose fees can be elevated to a binding contract as provided for in Fleischmann. Section 7.10 of the settlement agreement provides (Levin & LeVasseur Brief, p. 8) that petitioners will "apply (emphasis added) to the Court for allowance of fees and expenses." Thus any agreement between the appellees and MoPac and MRC are subject to Court approval, both as to propriety and amount. On page 38 of their Brief in Support of their Fee Application (Record, Item 217) Levin

and LeVasseur state: "Needless to say, the agreement is subject to the Court's approval." And, in fact, Judge Weinfeld only allowed Levin and LeVasseur $1,750,000 rather than the $2,000,000 they requested. Thus, the agreement to pay fees can hardly be considered an enforceable contract.

III.

THE COURT'S DECISION APPROVING THE ALLOWANCE OF ATTORNEYS' FEES AND EXPENSES IS NOT RES JUDICATA AS TO THIS APPEAL.

Plaintiffs in their brief argue that these Objectors may not question the allowance of fees by the District Court because they did not appeal its Judgment approving the settlement and that this Court is thus foreclosed from reviewing the allowance of such fees. This argument should be viewed in the light of the applicable law as stated by the United States Supreme Court in Vicksburg v. Henson, 231 U.S. 259 (1913), where the Court on page 268 said:

> "Coming to the question whether the former decree disposed of the rights of the parties, as was held in the court below, which judgment was affirmed by the Circuit Court of Appeals, it is undoubtedly true that a right, question or fact put in issue and decided by a court of competent jurisdiction must be taken as settling the rights of the parties in respect to such controversy and while it remains undisturbed is conclusive between them. The enforcement of this rule has been repeatedly

> said to be essential to secure the peace and repose of society and in order that an end may be made of controversies between parties who have once invoked and have had the determination by a competent judicial tribunal of the matters in dispute between them. It is no less true that to hold upon any unsubstantial ground that a controversy has been thus concluded is to do an injustice to litigants. We must therefore be careful to see, when the contention of former adjudication is made, that the matter was actually presented and decided and the rights of the contending parties thereby concluded."

and also stated on page 273:

> "The nature and extent of the former decree is not to be determined by seizing upon isolated parts of it or passages in the opinion considering the rights of the parties, but upon an examination of the issues made and intended to be submitted and what the decree was really designed to accomplish."

The judgment of the District Court approving the settlement was not appealable on the question of the allowance of fees. The issues relating to that subject matter were not before the Court for two reasons.

1. The settlement agreement specifically provided that the question of allowance of fees was to be reversed for consideration until "after the final judgment of approval of the settlement was no longer subject to appeal." As Judge Weinfeld said at 59 F.R.D. 373, "Objections are made to fees requested by attorneys

representing the respective plaintiffs. To the extent that such allowance may be granted, the parties are to be paid equally by Mississippi and MoPac. However, the fee applications are, in the event of acceptance of the settlement, subject to approval by the Court and a separate hearing, notice of which will be given to all interested parties, at which time any objections may be presented to the Court."

2. Civil Rule 11B of the District Court provides that a fee for attorneys in a derivative or class action shall not be paid except as allowed by the Court after hearing.

It was for these reasons that the District Judge treated the matter of allowance of fees as separate and independent from the question of the approval of the proposed settlement. Had he not done so, any finding that related to the question of fees would have been premature and in excess of the Court's jurisdiction. Further, the issues raised by these Objectors in the proceeding involving the application for fees were never passed upon by the Court in the original proceedings, nor decided in the decision of the District Court approving the settlement. The Court did not and could not deal with the question as to whether or not the allowance of fees should include services performed by

plaintiffs' attorneys in the voting rights case, whether or not claims for fees based upon services relating to the derivative count should be allowed, or whether or not there was duplication of services by the attorneys representing the various plaintiffs. Nor did the Court consider or rule upon the question of the relationship of the services performed by the attorneys to the benefits received by the parties, nor all of the other issues raised by these Objectors in the fee allowance proceeding.

It is obvious that the District Court at the time of the entry of the judgment approving the settlement had not decided the question of whether attorneys' fees could properly include services rendered in the voting rights case since in the Court's subsequent opinion awarding fees, it expressed grave misgivings on this point.

It is also clear that the attorneys for the defendants did not know from the Court's opinion approving the settlement that he would subsequently rule that such services were compensable. This appears clear from the disavowal of any agreement by the defendants to pay for such services in their statement of position in response to the petition by plaintiffs for fees. (Objector Cohen's Appendix, page 9).

Plaintiffs' attorneys would reduce the Court's

obligations under Civil Rule 11B to a mere ministerial accounting of hours spent by the attorneys. As argued by these Objectors on page 15 of their Brief, the duties of the Court go far beyond that, and all of the questions raised by the Objectors were the legitimate concern of the Court in the proceedings involving the allowance of attorneys' fees. It is noteworthy that neither the Court nor plaintiffs' attorneys raised the issue of res judicata in the proceedings for the allowance of attorneys' fees. If their position is valid now, it would have been valid then.

There is little doubt that had these Objectors sought to appeal the District Court's judgment approving the settlement on any grounds pertaining to the allowance of fees, immediate action to dismiss those proceedings would have resulted and nad been met with success.

In the entire opinion of the District Court, there is no finding which relates to the questions raised by these Objectors in the current proceeding, with the possible exception that the opinion states that these fees, when allowed, be "paid equally" by Mississippi and MoPac. However, the allowance of fees is inextricably interwoven with the determination as to who should pay them. It would not have served the interest of any of the parties were these Objectors to have appealed the

District Court's judgment approving the settlement on an issue which could have become moot if the Court later awarded fees in an amount which bore a relationship to the benefits received by MoPac or disallowed them entirely. Again, to have appealed solely on this issue would have been met with the valid argument that courts do not favor piecemeal appeals. Since the question of the allowance of fees was reserved for a subsequent proceeding, the Court's reference to "paid equally" can only be regarded as a premature expression of opinion or mere dicta not necessary to the approval of the settlement. See North Carolina R.R. v. Story, 268 U.S. 288 at 294 (1925) where the court said:

> "It is well settled that the principle of res judicata is only applicable to the point adjudged and not to points only collaterally under consideration, or incidentally under cognizance or only to be inferred by arguing from the decree. The reasoning and opinion of the court are not res judicata unless the subject matter in issue be definitely disposed of by the decree." (Citations omitted)

Also see Mutual Orange Distributors v. Agricultural Prorate Comm'n, 30 F. Supp. 93 at 941 (1940) where the court held that: "We hold that the expressions on the constitutional questions in the prohibition case were dicta. Dicta, of course, is not authority (citation omitted) and cannot be the basis for res judicata ..."

Dicta has been defined as a "remark made by a judge in pronouncing an opinion upon a cause ... not necessarily involved in the case, or essential to its determination." Black's Law Dictionary, Fourth Edition, page 541.

Judge Weinfeld's pronouncement as to the equal payment of fees was dicta inasmuch as the term "equal" did not appear in the settlement, and his determination of equal payment was not essential to the resolution of whether the settlement should be approved.

Furthermore, the question of apportionment was never placed in issue. No evidence was taken on the poin.. It was not argued and is thus not conclusive on these Objectors. United States v. Stevens, CCA Minn. 64 F. 2d 853, 856.

In its original objections, these Objectors question the validity of the notice to stockholders since it did not state the proportion of fees to be paid by each of the defendants. It could not have objected to the fees being paid equally since, as stated above, the word "equally" appeared nowhere in the settlement agreement nor in the notice to stockholders.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on Tuesday, October 29, 1974 at 10:00 a.m., I deposited in the mail, postage prepaid, two copies of the enclosed Reply Brief to each attorney involved in Levin v. Mississippi, 74-2104.

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